UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ARTHUR HARVEY,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 02-216-P-H
	)	
ANN VENEMAN, SECRETARY OF AGRICULTURE,	)	
	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Arthur Harvey has filed this civil action challenging the validity of several aspects of the regulatory rules established by the Department of Agriculture to implement the Federal Organic Foods Production Act of 1990 (OFPA), 7 U.S.C. §§ 6501-6522. In this recommended decision I address the parties' cross motions for summary judgment. (Dockets Nos. 27 & 31), ultimately concluding that the Secretary's motion should be **GRANTED,** except for Count Nine which I recommend be remanded to the Secretary for further rulemaking.

Scope of Administrative Procedures Act Review of Agency Rulemaking

A party is entitled to summary judgment if, "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). However, because the Administrative Procedures Act (APA) "standard affords great deference to agency decisionmaking and because the Secretary's action is presumed valid, judicial review, even at the summary judgment stage, is narrow." Associated Fisheries Me., Inc. v. Daley, 127 F.3d 104, 109 (1st Cir. 1997) (citing

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971) and Sierra Club v. Marsh, 976 F.2d 763, 769 (1st Cir.1992)).

As applicable to Harvey's challenges, the APA provides that this Court "shall":

> **(1)** compel agency action unlawfully withheld or unreasonably delayed; and
> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> > **(B)** contrary to constitutional right, power, privilege, or immunity;
> > **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> > **(D)** without observance of procedure required by law;
> > **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> > **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706.

This is a dispute over the propriety of the rules promulgated by the Secretary. The First Circuit has explained that the standard for judicial review of informal notice and comment rulemaking under the "arbitrary and capricious" standard of subsection (A) "is narrow, and a court may not set aside an agency rule that is 'rational' and 'based on a consideration of the relevant factors.'" Brewer v. Madigan, 945 F.2d 449, 456-57 (1st Cir. 1991) (quoting Motor Vehicle Mfrs. Assoc. v. State Farm Mut., 463 U.S. 29, 42-43 (1983)). This Court need only determine whether the Secretary's decision with respect to the promulgation of these regulations "was consonant with [her] statutory powers, reasoned, and supported by substantial evidence in the record." Associated Fisheries, 127 F.3d at 109.

The delegation of rulemaking authority by Congress to agencies can be either express or implicit. Chevron U.S.A. Inc. v. Natural Res. Def. Counsel, 467 U.S. 837, 844 (1984). In United States v. Mead Corp., the Court expounded on Chevron:

> Congress ... may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. [Chevron, 467 U.S.] at 845. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, see id., at 845-846, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable, see id., at 842-845; cf. 5 U.S.C. § 706(2) (a reviewing court shall set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

533 U.S. 218, 229 (2001). And, although he might have it otherwise, in this suit Harvey's submissions only support a facial, as opposed to an as applied, challenge to the rules and he cannot use this suit to attack an imagined unlawful application of the rule, Massachusetts v. United States, 856 F.2d 378, 384 (1988), a limitation that I have applied in my review in a manner that should assuage the Secretary's various ripeness concerns.

Standing

With respect to the Secretary's challenge to Harvey's standing, I conclude that Harvey has standing with to respect at least eight of the nine claims. It is uncontested that Harvey is a certified organic farmer, a handler as defined under OFPA, an organic foods consumer, and an organic inspector employed by USDA accredited certifiers.

(Harvey Aff., Docket No. 28.) There are three elements to "the irreducible constitutional minimum of standing," Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992): concrete injury that "must affect the plaintiff in a personal and individual way" and that is "actual or imminent," id. at 560 & n.1; "a causal connection between the injury and the conduct complained of," id.; and the prospect of redress from the injury must be likely verses speculative, id. at 561. In Lujan the Court observed:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

Id. at 561-62. Vis-à-vis Harvey's challenges to the propriety of the procedures used during rulemaking, he does not have "standing merely because of the government's failure to comply with the relevant procedural requirements." Cent. & S.W. Servs., Inc. v. E.P.A., 220 F.3d 683, 699 (5th Cir. 2000). "Instead," Harvey "must show an injury that is both concrete and particular, as opposed to an undifferentiated interest in the proper application of the law." Id. Because of Harvey's status as an approved certifier, an organic grower, an organic consumer, and an individual actively involved in the rule making process, I do not, for the most part, credit the Secretary's standing concern, except, as noted below, with respect to Count VII.

Overview of OFPA

OFPA was enacted "to establish national standards governing the marketing of certain agricultural products as organically produced products"; "to assure consumers that organically produced products meet a consistent standard"; and "to facilitate interstate

commerce in fresh and processed food that is organically produced." 7 U.S.C. § 6501. These aims are pursued by the establishment of "an organic certification program for producers and handlers of agricultural products that have been produced using organic methods." Id. § 6503(a).

OFPA provides:

> To be sold or labeled as an organically produced agricultural product under this chapter, an agricultural product shall—
>
> **(1)** have been produced and handled without the use of synthetic chemicals, except as otherwise provided in this chapter;
>
> **(2)** except as otherwise provided in this chapter and excluding livestock, not be produced on land to which any prohibited substances, including synthetic chemicals, have been applied during the 3 years immediately preceding the harvest of the agricultural products; and
>
> **(3)** be produced and handled in compliance with an organic plan agreed to by the producer and handler of such product and the certifying agent.

7 U.S.C. § 6504. Section 6505(a)(1) addresses the compliance requirement and resulting labeling of products:

> **(A)** a person may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with this chapter; and
>
> **(B)** no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with this chapter.

"A label affixed, or other market information provided, in accordance with paragraph (1) may indicate that the agricultural product meets Department of Agriculture standards for organic production and may incorporate the Department of Agriculture seal." Id. § 6505(a)(2). See also id. § 6506 (listing OFPA's general requirements for the certification program).

Harvey's Nine Counts

First Three Counts

Counts I, II, and III pertain to processed food. OFPA defines processing to include manufacturing treatments such as cooking, drying, extracting, eviscerating, and the like, as well as techniques used to enclose food in a container. 7 U.S.C. § 6502(17). It also defines a handler as "any person engaged in the business of handling agricultural products, except … final retailers [who] do not process agricultural products." Id. § 6502(9). In his first three counts, Harvey addresses the regulations pertaining to handlers, as opposed to the regulations that pertain to producers, who are persons "who engage [] in the business of growing and producing food or feed." Id. § 6502(18).

Counts I & III

Counts I and III attack the rules promulgated vis-à-vis the "The National List of Allowed and Prohibited Substances." Section 6517 of title 7 directs the Secretary of Agriculture to establish a list of approved and prohibited substances with respect to standards for organic production, id. § 6517(a), a list that must include an itemization of each synthetic substance not prohibited under OFPA, id. § 6517(b), (c)(1). Congress in 7 U.S.C. § 6517 has expressly delegated rulemaking authority to the Secretary with respect to the National List, although it has required that she exercise this authority only based upon the proposals of the National Organic Standards Board (NOSB). Id. § 6517(d)(1); compare U. S. S. v. F.T.C., __ F. Supp. __, 2003 WL 22203719, *5-7, 2003 U.S. Dist. LEXIS 16650, *14-17 (W.D. Okla. Sept. 23, 2003) (concluding that Congress had not expressly granted authority to the Federal Trade Commission to establish a "do-not-call" registry vis-à-vis the telemarketing industry, and that there was no implied

authority for the agency to establish the registry, noting that the Federal Communications Commission was expressly granted the authority).

Count I- National List of nonorganically produced agricultural products

In Count I Harvey challenges the rules list of nonorganically produced agricultural products, in particular 7 C.F.R. § 205.606:

> The following nonorganically produced agricultural products may be used as ingredients in or on processed products labeled as "organic" or "made with organic (specified ingredients or food group(s))" only in accordance with any restrictions specified in this section.
>
> Any nonorganically produced agricultural product may be used in accordance with the restrictions specified in this section and when the product is not commercially available in organic form.
>
> (a) Cornstarch (native)
>
> (b) Gums--water extracted only (arabic, guar, locust bean, carob bean)
>
> (c) Kelp--for use only as a thickener and dietary supplement
>
> (d) Lecithin--unbleached
>
> (e) Pectin (high-methoxy)

Section 6510 of title 7 speaks to the certification for organic foods handling operations and provides:

> For a handling operation to be certified under this chapter, each person on such handling operation shall not, with respect to any agricultural product covered by this chapter—
>
> **(1)** add any synthetic ingredient during the processing or any postharvest handling of the product;
>
> **....**
>
> **(4)** add any ingredients that are not organically produced in accordance with this chapter and the applicable organic certification program, unless such ingredients are included on the National List and represent not more than 5 percent of the weight of the total finished product (excluding salt and water)[.]

7 U.S.C. § 6510(a). "The term 'synthetic,'" the definitional section relates, "means a substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or

mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes." Id. § 6502(21).

Harvey asks this Court to order the deletion of 7 C.F.R. § 205.606's language: "Any nonorganically produced agricultural product may be used in accordance with the restrictions specified in this section and when the product is not commercially available in organic form." He claims that this provision defeats the National List sunset provisions. See 7 U.S.C. § 6517(e) ("No exemption or prohibition contained in the National List shall be valid unless the National Organic Standards Board has reviewed such exemption or prohibition as provided in this section within 5 years of such exemption or prohibition being adopted or reviewed and the Secretary has renewed such exemption or prohibition."). This is because the nonorganic products that are used under 7 C.F.R. § 205.606 are not expressly exempted under the National List procedures identified in 7 U.S.C. § 6517, yet these products that are not on a unified national list can account for five percent of the weight of processed food under 7 U.S.C. § 6510(a)(4). Harvey reads the provision as allowing each manufacturer to make the "commercially [non]available" determination, thereby creating thousands of private lists rather than one national list. Harvey argues that there is a "fundamental conflict" between the statute and the regulation. He also contends that the regulation impermissibly bypasses 7 U.S.C. § 6518(k)(3) which speaks of technical advisory panels to evaluate materials for the National List. 7 U.S.C. § 6518(k)(3) ("The Board shall develop the proposed National List or proposed amendments to the National List for submission to the Secretary in accordance with section 6517 of this title.").

The Secretary counters that § 205.606 "permits the use of only the five types of nonorganically produced agricultural products as ingredients in or on processing products that are labeled as 'organic' or 'made with organic'" and provides for this use only if the ingredient in not commercially available in an organic form. (Def's Opp'n & Cross Mot. at 15.) This is consistent, the Department argues, with the 7 U.S.C. § 6517(c)(1)(A)(ii) exemption in instances of commercial unavailability. (Id.)[1]

Although 7 C.F.R. § 205.606 may be awkwardly phrased, I agree with the Secretary that the regulation is consistent with the OFPA. My reading of the statute and the regulation is that there is no countenance of private lists but that one national list of these nonorganically produced agricultural products is to be maintained and the ingredients thereon are to be identified through the formal process set forth. The Senate Report thoroughly supports this reading. S. Rep. No. 547, 1990 U.S.C.C.A.N. 4656, 4943. The sunset provision, therefore, applies to all the national list ingredients.[2] Furthermore, the National Organic Standards Board did make recommendations vis-à-vis this list in conformity with its 7 U.S.C. § 6158(k)(2) mandate. (See, e.g., App. No. 16 at 13-16.) Accordingly, I conclude that there are no 5 U.S.C. § 706(2) grounds for disturbing 7 C.F.R. § 205.606 at this juncture in the framework of a facial challenge. See Brewer, 945 F.2d at 456-57.

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[1] Commercially available is defined by the rule: "The ability to obtain a production input in an appropriate form, quality, or quantity to fulfill an essential function in a system of organic production or handling, as determined by the certifying agent in the course of reviewing the organic plan." 7 C.F.R. § 205.2

[2] I do agree with Harvey that, while the Department implies without stating straight-out, that the five ingredients listed in 7 C.F.R. § 205.606 are the only ingredients that can be used if an organic product is not commercially available, I, too, found the equivocation puzzling. In this review of the rulemaking I examine only whether the rule is consistent with the statute and do not speculate whether it could be misconstrued in such a manner that contravened the act. Declaratory judgment at this stage is not available. Actual violations of the rule can be redressed through 7 U.S.C. § 6519.

Count III- National List of allowable <u>nonagricultural</u>, nonorganic substances

In Count III Harvey takes on two of the regulation's provisions concerning the National List and allowable <u>nonagricultural</u>, nonorganic substances (as opposed to the above discussion of agriculture nonorganic substances). Subsection 205.600(b) reads:

> In addition to the criteria set forth in the Act, any synthetic substance used as a processing aid or adjuvant will be evaluated against the following criteria:
>
> (1) The substance cannot be produced from a natural source and there are no organic substitutes;
> (2) The substance's manufacture, use, and disposal do not have adverse effects on the environment and are done in a manner compatible with organic handling;
> (3) The nutritional quality of the food is maintained when the substance is used, and the substance, itself, or its breakdown products do not have an adverse effect on human health as defined by applicable Federal regulations;
> (4) The substance's primary use is not as a preservative or to recreate or improve flavors, colors, textures, or nutritive value lost during processing, except where the replacement of nutrients is required by law;
> (5) The substance is listed as generally recognized as safe (GRAS) by Food and Drug Administration (FDA) when used in accordance with FDA's good manufacturing practices (GMP) and contains no residues of heavy metals or other contaminants in excess of tolerances set by FDA; and
> (6) The substance is essential for the handling of organically produced agricultural products.

7 C.F.R. § 205.600(b). Subsection 205.605 provides a list of thirty-six "nonagricultural substances [that] may be used as ingredients in or on processed products labeled as 'organic' or 'made with organic.'" 7 C.F.R. § 205.605.

Harvey contends that these two regulatory subsections violate the spirit of the OFPA's "corner stone," 7 U.S.C. § 6510(a)(1), which states that a certified handling operation "shall not, with respect to any agricultural product covered by this chapter …

add any synthetic ingredient during the processing or any post harvest handling of the product."[3]

The Secretary counters that OFPA expressly directs her to deal with the exemption of otherwise prohibited synthetic substances vis-à-vis the establishment of a "National List":

> The National List may provide for the use of substances in an organic farming or handling operation that are otherwise prohibited under this chapter only if—
>
> **(A)** the Secretary determines, in consultation with the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency, that the use of such substances—
>
> **(i)** would not be harmful to human health or the environment;
>
> **(ii)** is necessary to the production or handling of the agricultural product because of the unavailability of wholly natural substitute products; and
>
> **(iii)** is consistent with organic farming and handling;
>
> **(B)** the substance—
>
> **(i)** is used in production and contains an active synthetic ingredient in the following categories: copper and sulfur compounds; toxins derived from bacteria; pheromones, soaps, horticultural oils, fish emulsions, treated seed, vitamins and minerals; livestock parasiticides and medicines and production aids including netting, tree wraps and seals, insect traps, sticky barriers, row covers, and equipment cleansers;
>
> **(ii)** is used in production and contains synthetic inert ingredients that are not classified by the Administrator of the Environmental Protection Agency as inerts of toxicological concern; or
>
> **(iii)** is used in handling and is non-synthetic but is not organically produced; and
>
> **(C)** the specific exemption is developed using the procedures described in subsection (d) of this section.

Id. § 6517(c). This section also sets forth the procedures for establishing the list:

> (1) In general
>
> The National List established by the Secretary shall be based upon a proposed national list or proposed amendments to the National List developed by the National Organic Standards Board.

[3] Harvey also asserts that § 205.600(b) and § 205.605 are "generally acknowledged" to violate OFPA. As best as I can garner, his support for this statement is his own memorandum on the subject. (Docket No. 2, App. 1.)

> (2) No additions
> The Secretary may not include exemptions for the use of specific synthetic substances in the National List other than those exemptions contained in the Proposed National List or Proposed Amendments to the National List.
> (3) Prohibited substances
> In no instance shall the National List include any substance, the presence of which in food has been prohibited by Federal regulatory action.
> (4) Notice and comment
> Before establishing the National List or before making any amendments to the National List, the Secretary shall publish the Proposed National List or any Proposed Amendments to the National List in the Federal Register and seek public comment on such proposals. The Secretary shall include in such Notice any changes to such proposed list or amendments recommended by the Secretary.

Id. § 6517(d).

The Secretary agrees with Harvey that 7 U.S.C.§ 6510 contains a "general prohibition" against adding synthetic ingredients in handling operations. However, she argues that OFPA's § 6517 admits for exemptions if those ingredients meet the criterion to be placed on the National List. Accordingly, the Rule's provisions that deal with exemptions, 7 C.F.R. § 205.600 and § 205.605, are legitimate offspring of the OFPA statutory scheme that anticipates exemptions.

Facially, I do not see how these provisions of the rule violate the spirit of the OFPA. Harvey has not pointed to any evidence in the administrative record that the Secretary has failed to act in accordance with subsections (c) and (d) of 7 U.S.C. § 6517; rather he argues that any exemption to the § 6510(a)(1) prohibition on synthetics is contrary to OFPA. I simply cannot agree with his position given the contemporaneous enactment of § 6517 anticipating the possibility of some exemptions and the discussion of the Secretary's discretion in this area in the Senate Report. See S. Rep. 101-357,

reprinted in 1990 U.S.C.C.A.N. 4943, 4952-53.[4] Furthermore, it is clear that Congress did not intend the Secretary to countenance the existence of numerous private lists. Id. at 4952-53 ("The Committee does not intend to allow the use of many synthetic substances. This legislation has been carefully written to prevent widespread exceptions or 'loopholes' in the organic standards which would circumvent the intent of this legislation. . . . The Secretary may not include exemptions for synthetic substances other than those exemptions recommended by the National Organic Standards Board. The Proposed National List represents the universe of synthetic materials from which the Secretary may choose.").

Count II

Harvey argues in Count II that the rules's contemplation of the use of the term "made with organic" on products that are 70 to 95 percent organic creates a conflict with OFPA. In Harvey's view 7 U.S.C. § 6510(a)(4) forbids the certification of products containing more than five-percent of ingredients that are non-organic. Harvey argues that only exceptionally well-informed consumers can understand the difference between "made with organic," "organic," and "100% organic" products. He contends that the USDA should amend the rules to have the labels read "made partly with organic."

The Secretary argues that Harvey has not correctly read the statutory and regulatory scheme. She states that certain processed food is exempt from § 6505(a), because that subsection does not apply to agricultural products that:

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[4] Harvey's perception may be different, but it is apparent that the synthetic allowance for the USDA labeled products is subject to the five percent by weight ceiling on synthetic ingredients. See 7 U.S.C. § 6510(a); S. Rep. 101-357, reprinted in 1990 U.S.C.C.A.N. 4943, 4953 ("The Secretary may not include exemptions for synthetic substances other than those exemptions recommended by the National Organic Standards Board. The Proposed National List represents the universe of synthetic materials from which the Secretary may choose. Before establishing the final National List the Secretary shall publish the Proposed National List in the Federal Register and seek public comment. The same procedures are to be followed for any amendments to the National List."); accord id. at 5222.

> **(1)** contain at least 50 percent organically produced ingredients by weight, excluding water and salt, to the extent that the Secretary, in consultation with the National Organic Standards Board and the Secretary of Health and Human Services, has determined to permit the word "organic" to be used on the principal display panel of such products only for the purpose of describing the organically produced ingredients; or
>
> **(2)** contain less than 50 percent organically produced ingredients by weight, excluding water and salt, to the extent that the Secretary, in consultation with the National Organic Standards Board and the Secretary of Health and Human Services, has determined to permit the word "organic" to appear on the ingredient listing panel to describe those ingredients that are organically produced in accordance with this chapter.

Id. § 6505(c). This section gives the Secretary the discretion to develop an additional two tiers in the labeling hierarchy that are inferior to the USDA seal of approval used to identify products that meet the 7 U.S.C. § 6510(a)(4) ninety-five percent standard.

The attendant regulations are 7 C.F.R. § 205.301 and § 205.304. Section 205.301 provides:

> (a) Products sold, labeled, or represented as "100 percent organic." A raw or processed agricultural product sold, labeled, or represented as "100 percent organic" must contain (by weight or fluid volume, excluding water and salt) 100 percent organically produced ingredients. If labeled as organically produced, such product must be labeled pursuant to § 205.303.
> (b) Products sold, labeled, or represented as "organic." A raw or processed agricultural product sold, labeled, or represented as "organic" must contain (by weight or fluid volume, excluding water and salt) not less than 95 percent organically produced raw or processed agricultural products. Any remaining product ingredients must be organically produced, unless not commercially available in organic form, or must be nonagricultural substances or nonorganically produced agricultural products produced consistent with the National List in subpart G of this part. If labeled as organically produced, such product must be labeled pursuant to § 205.303.
> (c) Products sold, labeled, or represented as "made with organic (specified ingredients or food group(s))." Multiingredient agricultural product sold, labeled, or represented as "made with organic (specified ingredients or food group(s))" must contain (by weight or fluid volume, excluding water and salt) at least 70 percent organically produced ingredients which are produced and handled pursuant to requirements in subpart C of this part. No ingredients may be produced using prohibited practices specified in paragraphs (f)(1), (2), and (3) of § 205.301. Nonorganic ingredients may

be produced without regard to paragraphs (f)(4), (5), (6), and (7) of § 205.301. If labeled as containing organically produced ingredients or food groups, such product must be labeled pursuant to § 205.304.
(d) Products with less than 70 percent organically produced ingredients. The organic ingredients in multiingredient agricultural product containing less than 70 percent organically produced ingredients (by weight or fluid volume, excluding water and salt) must be produced and handled pursuant to requirements in subpart C of this part. The nonorganic ingredients may be produced and handled without regard to the requirements of this part. Multiingredient agricultural product containing less than 70 percent organically produced ingredients may represent the organic nature of the product only as provided in § 205.305.

7 C.F.R. § 205.301. Section 205.304 states, as applicable:

Packaged products labeled "made with organic (specified ingredients or food group(s))."

(a) Agricultural products in packages described in § 205.301(c) may display on the principal display panel, information panel, and any other panel and on any labeling or market information concerning the product:

(1) The statement:

(i) "Made with organic (specified ingredients)": Provided, That, the statement does not list more than three organically produced ingredients; or
(ii) "Made with organic (specified food groups)": Provided, That, the statement does not list more than three of the following food groups: beans, fish, fruits, grains, herbs, meats, nuts, oils, poultry, seeds, spices, sweeteners, and vegetables or processed milk products; and, Provided further, That, all ingredients of each listed food group in the product must be organically produced; and
(iii) Which appears in letters that do not exceed one-half the size of the largest type size on the panel and which appears in its entirety in the same type size, style, and color without highlighting.

(2) The percentage of organic ingredients in the product. The size of the percentage statement must not exceed one-half the size of the largest type size on the panel on which the statement is displayed and must appear in its entirety in the same type size, style, and color without highlighting.
(3) The seal, logo, or other identifying mark of the certifying agent that certified the handler of the finished product.

(b) Agricultural products in packages described in § 205.301(c) must:

> (1) In the ingredient statement, identify each organic ingredient with the word, "organic," or with an asterisk or other reference mark which is defined below the ingredient statement to indicate the ingredient is organically produced. Water or salt included as ingredients cannot be identified as organic.
> (2) On the information panel, below the information identifying the handler or distributor of the product and preceded by the statement, "Certified organic by * * *," or similar phrase, identify the name of the certifying agent that certified the handler of the finished product: Except, That, the business address, Internet address, or telephone number of the certifying agent may be included in such label.
>
> (c) Agricultural products in packages described in § 205.301(c) must not display the USDA seal.

Id. § 205.304.

As with the Count I challenge, Congress has expressly delegated rule making authority to the Secretary and conferred discretion to make rules about allowance of the use of the word "organic" in labeling products that do not meet the ninety-five-percent mark of 7 U.S.C. § 6510(a)(4). Given the express statutory authority granted the Secretary under § 6505(c) to permit other uses of the term organic, the development of the rules on this score is not contrary to OFPA. See S. Rep. 101-357, reprinted in 1990 U.S.C.C.A.N. 4943, 4955-56, 5221. Although Harvey may have preferred a different phrasing, he has not articulated how the administrative record supports a conclusion that the Secretary was "arbitrary and capricious" in exercising her rulemaking discretion granted by § 6505(c).

Count IV

In Count IV Harvey seeks a "finding" that the Secretary has arbitrarily failed to implement 7 U.S.C. § 6506(a)(9), a subsection that requires the OFPA program to "provide for public access to certification documents and laboratory analysis that pertain to certification." Harvey claims that Rules § 205.504(b)(5)(ii) and § 205.404(b) "shrink

the documents which are publicly available to almost the vanishing point." (Compl. at 10.) He faults these rules for allowing the public to remain ignorant of the location of fields and factories; unaware of whether non-organic products are produced in the vicinity of organic products; and not privy to any noncompliance that a producer is required to correct, certifications that have been revoked, or commitments that the producer had to make to obtain certification. Harvey would have the rule divide the system plan into two sections, one for financial-marketing-propriety information and one for general data.

The Secretary responds that the public disclosure provision of 7 U.S.C. § 2506(a)(9) must be juxtaposed against the confidentiality provision of § 6515(g). The latter subsection of OFPA states:

> Except as provided in section 6506(a)(9) of this title, any certifying agent shall maintain strict confidentiality with respect to its clients under the applicable organic certification program and may not disclose to third parties (with the exception of the Secretary or the applicable governing State official) any business related information concerning such client obtained while implementing this chapter.

7 U.S.C. § 6515.

The Secretary recognized the tension between the disclosure and confidentiality provisions of OFPA during the rulemaking process. The preamble to the Final Rule observed:

> Public Access to Records. Several commenters asked that the public have full access to any certifying agent record on organic production and/or handling operations. Other commenters expressed concerns about certifying agents divulging confidential business information and asked that records containing confidential business information not be taken from the business's physical location.
>
> We have not changed this provision. The recordkeeping requirements are designed to seek a balance between the public's right to know and a business's right to retain confidential business information.

> Certifying agents must have access to certain records during their review of the operation to determine the operation's compliance with the NOP. However, certifying agents are required to protect an operation's confidential business information. Requiring full public access could compromise a business's competitive position and place an unfair burden on the organic industry.

65 Fed. Reg. 80548, 80556. Later, the Secretary reported:

> Comments on section 205.504(b)(5) were mixed. Some commenters felt that the proposal fell short of the OFPA requirement to "Provide for public access to certification documents and lab analysis." Others thought that too much confidential information would be released.
>
> The Act requires public access, at section 2107(a)(9), to certification documents and laboratory analyses pertaining to certification. Accordingly, we disagree with those commenters who requested that such documents not be released to the public. We also disagree with the commenters who contend that the requirement for public disclosure falls short of what is required by the Act. Section 205.504(b)(5) meets the requirements of the Act by requiring the release of those documents cited in section 2107(a)(9) of the Act. The section also authorizes the release of other business information as authorized in writing by the producer or handler.

Id. at 80608. The final promulgated rule provides:

> A copy of the procedures to be used, including any fees to be assessed, for making the following information available to any member of the public upon request:
>
> (i) Certification certificates issued during the current and 3 preceding calendar years;
>
> (ii) A list of producers and handlers whose operations it has certified, including for each the name of the operation, type(s) of operation, products produced, and the effective date of the certification, during the current and 3 preceding calendar years;
>
> (iii) The results of laboratory analyses for residues of pesticides and other prohibited substances conducted during the current and 3 preceding calendar years; and
>
> (iv) Other business information as permitted in writing by the producer or handler[.]

7 C.F.R. § 205.504(b)(5).[5] Harvey argues that "the scope of information that certified operations must provide is so limited that it is barely enough for commerce in organic products to proceed." (Pl.'s Resp. at 18.) The Secretary, of course, views her resolution of OFPA's disclosure/confidentiality tension as one that strikes a reasonable balance.

It is clear that Congress has expressly required the Secretary to include in this program a provision for public access to certification documents and laboratory analyses as they pertain to certification. See 7 U.S.C. §§ 6506(a)(9), 6506(11). Furthermore, it is not as if the Secretary has failed to act on her § 6509(a)(9) mandate and needs to be compelled to act, see 5 U.S.C. § 706(1); rather, it is a question of whether her rule making on this score was arbitrary, capricious, and/or an abuse of discretion, see id. § 706(2). The Secretary's resolution of the tension between confidentiality and public access cannot be characterized as arbitrary, capricious, or an abuse of discretion. The Secretary has provided a rational articulation of her reason for her rule and the choices made based on the comments and concerns before her. See Motor Vehicle Mfrs. Assoc., 463 U.S. at 42-43; Brewer, 945 F.2d at 56-57.

Count V

Count V faults the Secretary for "unnecessarily and arbitrarily" excluding wholesalers and many retailers from OFPA's compliance, inspection, and certification

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[5] The other subsection Harvey cites is 7 C.F.R. § 205.404(b).

> The certifying agent must issue a certificate of organic operation which specifies the:
> (1) Name and address of the certified operation;
> (2) Effective date of certification;
> (3) Categories of organic operation, including crops, wild crops, livestock, or processed products produced by the certified operation; and
> (4) Name, address, and telephone number of the certifying agent.

requirements. He wants the Court to order the deletion of 7 C.F.R. § 205.101(b) which provides:

> Exclusions.
> (1) A handling operation or portion of a handling operation is excluded from the requirements of this part, except for the requirements for the prevention of commingling and contact with prohibited substances as set forth in § 205.272 with respect to any organically produced products, if such operation or portion of the operation only sells organic agricultural products labeled as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" that:
> (i) Are packaged or otherwise enclosed in a container prior to being received or acquired by the operation; and
> (ii) Remain in the same package or container and are not otherwise processed while in the control of the handling operation.
> (2) A handling operation that is a retail food establishment or portion of a retail food establishment that processes, on the premises of the retail food establishment, raw and ready-to-eat food from agricultural products that were previously labeled as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" is excluded from the requirements in this part, except:
> (i) The requirements for the prevention of contact with prohibited substances as set forth in § 205.272; and
> (ii) The labeling provisions of § 205.310.

7 C.F.R. § 205.101(b). Harvey complains that this subsection forfeits regulatory oversight "from those sectors of the organic industry where most violations of organic integrity occur" (Compl. at 11), much to the detriment of consumers and small farmers (who must shoulder the fee burden of the act, a burden that these handlers of value-added products could share and more easily absorb). He notes that the USDA justifies the exclusion of these entities on the basis of a lack of consensus on certification standards and the inability to assure there would be a sufficient number of certifying agencies to cover the volume of such businesses.

The Secretary responds by stating that OFPA primarily regulates producers and handlers of organic agricultural products, citing 7 U.S.C. §§ 6503(a), 6504, 6506(a).

And, read as a whole, for the most part OFPA does not attempt to regulate retailers and retail food establishments. Instead, it is aimed at producers engaged in the business of growing or producing food or feed, see id. § 6502(17), (18), and handlers or handling operations, expressly excluding final retailers that are not processors of the products also, id. § 6502(9),(10),(17). The Secretary's rule exempts only wholesale and retail operations selling previously packaged organic food and retail food establishments that sell processed food containing organic ingredients. By dint of 7 C.F.R. § 205.272, these entities are prohibited from contaminating and commingling organic products, and are subject to 7 U.S.C. § 6505(a)(1)(b)'s directive that "no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with this chapter" and the civil penalty provisions of § 6519(a).

The Secretary notes that she received many comments on the question of whether wholesale and retail operations selling previously packaged organic products and retail food establishments selling processed foods would fall within the embrace of OFPA. The Federal Register reads on this score:

> Retailer Exclusion from Certification. Many commenters objected to the provisions of section 205.101(b)(2) which exclude retail food establishments from certification. These commenters assert that only final retailers that do not process agricultural products should be excluded from certification. There is clearly a great deal of public concern regarding the handling of organic products by retail food establishments. We have not required certification of retail food establishments at this time because of a lack of consensus as to whether retail food establishments should be certified, a lack of condenses [sic] on retailer certification standards, and a concern about the capacity of existing certifying agents to certify the sheer volume of such businesses. In addition, most existing certification programs do not include retail food establishments, and we do not believe

> there is sufficient consensus [sic] to institute such a significant expansion in the scope of certification at this time. However, since a few [s]tates have established procedures for certifying retail food establishments, we will assess their experience and continue to seek consensus on this issue of establishing retailer provisions under the NOP. Any such change would be preceded by rulemaking with an opportunity for public comment. The exclusion of nonexempt retail food establishments from this final rule does not prevent a [s]tate from developing an organic retail food establishment program as a component of its SOP. However, as with any component of an SOP, the Secretary will review such components on a case-by-case basis.

65 Fed. Reg. at 80555. As there were comments on both sides of the spectrum and no consensus, the Secretary chose, she thinks reasonably, to defer regulations of these sectors of the organic community until she can discern greater agreement on the appropriate scope of the regulation. She notes that states can fill the void if they desire, through components of a State Organic Program, just as long the Secretary first reviews and approves the state initiative.[6]

With respect to the question of whether these entities should be subject to regulation as Harvey argues, Congress has not directly addressed the question and the statute is ambiguous on the issue, so I must ask "whether the agency's answer is based on a permissible construction of the statute." Chevron, 467 U.S. at 843. The delegation of authority on this point is implicit as opposed to explicit, and this Court "may not substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency." Id. at 844. The decision made vis-à-vis these entities cannot be described as an unreasonable "policy choice". Id. at 845.

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[6] Harvey complains that although the Secretary was given three years to implement OFPA, she dragged her feet in this area for ten additional years. He argues that at the time when the act was passed retailers of organic products were small, mom-and-pop type operations that did not process and were reasonably exempt from the Act. (Pl.'s Reply at 21.) Today, Harvey states, the situation is very different as there has been a rise of national and regional chain stores selling organic foods and most of these fall under the definition of handler due to their baking, processing, and packaging activities. (Id. at 21-22.)

The Senate report thoroughly supports the Secretary's position as it seems that the Senate did not have in mind the immediate application of OFPA to wholesale and retail operations. It is fair to read the thrust of OFPA as being towards regulating producers and handlers and the Senate Report emphasizes as being of "particular importance" that the definition of producer and handler encompass "all those involved in the farming, processing, packaging, storing, or selling of organically produced products, excluding the final retailer who does not process the food." Sen. Rep. No. 357, reprinted in, 1990 U.S.C.C.A.N. 4656, 5220. Vis-à-vis the "National organic production program[:]" the Senate report states that the Secretary is authorized "to establish standards for producers and handlers who produce organic agricultural products," id. at 5220, with no mention of retailers. The report marked the concerns of "large food chains and distributors" by acknowledging that they were concerned about "verifying the authenticity of organic items" and OFPA could serve them because "they are not in a position to work directly with growers on certification as some smaller health food stores have done. They also find it difficult to handle the wide array of labels." Id. at 4944. I see further support for the Secretary's approach to wholesalers and retailers in the statement that "this legislation covers all food products from their inception through final processing." Id. at 4946. Finally, with respect to the composition of the National List, the Senate reported, "The Secretary is required to appoint a 13-member National Organic Standards Board to assist generally in the development of standards and specifically to formulate a Proposed National List. The Committee regards this Board as an essential advisor to the Secretary on all issues concerning this bill and anticipates that many of the key decisions concerning standards will result from recommendations by this Board." Id. at 4950. Yet,

of the fifteen pivotal positions on the board, only one is to be held by a retail member, while four are to be individuals who own or operate organic farming operations, and two who own or operate organic handling operations. 7 U.S.C. § 6518(b). The remaining four categories are individuals who have expertise in the area of environmental protection and conservation, public and consumer interest, food science and certification. Id. While the Secretary may have the discretion under OFPA to regulate retailers in the future as she suggests, cf. 1990 U.S.C.C.A.N. 4656, 4946 (suggesting that the Secretary working with the Board may in the future elaborate standards on livestock criteria and develop standards for aquaculture products), it is clear on my review that her decision not to do so in the initial rulemaking cycle was not unreasonable within the meaning of Chevron.

Count VI

In his sixth count, Harvey attacks OFPA's prohibition of advice-giving by certifiers and inspectors. The challenged rule prohibits a certifying agent from "giving advice or providing consultancy services, to certification applicants or certified operations, for overcoming identified barriers to certification." 7 C.F.R. § 205.501(a)(11)(IV). Harvey wants this Court to strike "giving advice or" from the Rule. He notes that OFPA only provides that a certifying agent cannot give "advice concerning organic practices or techniques for a fee, other than fees established under such program." 7 U.S.C. § 6515. The rule, in contrast, prevents inspectors like Harvey from making timely suggestions to farmers, particularly small farmers who may not understand each complex facet of the organic standards. This restraint harms farmers in need of the information inspectors might impart; harms consumers in that inspector advice could improve crops and the economic viability of local food production and

availability; and it harms Harvey as an inspector because it hinders his ability to pursue his objectives of supporting the integrity of organic production and marketing and helping farmers to understand organic systems and how to produce efficiently. (Compl. at 12.)

Harvey also argues in his motion for summary judgment that 7 C.F.R. § 205.501(a)(11) was promulgated without adequate notice and comment and speculates that this procedural short-circuit was driven, at least in part, by the hope of facilitating international trade by complying with the International Service Organization (ISO) Guide Number 65. He states that this guide was not available to him during the key notice and comment period due to its cost of acquisition and copyrighted nature.

The Secretary contends that the advice prohibition is consistent with OFPA and is "an entirely reasonable measure to avoid conflicts of interest". (Def.'s Reply & Cross Mot. at 30-31.) She argues that the restriction in the Rule is an "elaboration" and "permissible interpretation" of the 7 U.S.C. § 6515(h) conflict of interest/anti-bribery restraints against inspecting operations in which the agent has a commercial interest, accepting payments and the like beyond the prescribed fee, and providing advice concerning organic practice and techniques for a fee. (Id. at 31.) Countering Harvey's argument that OFPA is intended to prohibit only advice for a fee, the Secretary argues that the Rule does not prohibit all free advice, as certifying agents can do general educational workshops, training programs, and the like. The Secretary concedes that she attempted to make the rule consistent with ISO 65 in order to facilitate United States producers' and handlers' access to European Union markets. (Def.'s Reply & Cross Mot.

at 32.) She asserts that the rule was made in the spirit of the Senate Report. The applicable paragraph of the report reads:

> American farmers are beginning to benefit from lucrative organic export markets. However, in absence of national standards, American businesses are finding it increasingly difficult to negotiate in foreign markets. Several countries have national organic standards. There is a proposal before the European Economic Community on organic food that, if passed would establish production and inspection standards for member countries. The International Federation of Organic Agricultural Movements, among other organizations, is working to harmonize standards internationally.

1990 U.S.C.C.A.N. at 4944.

Although 7 U.S.C. § 6515(h) expressly prohibits certifier conduct identified by Congress as creating a conflict of interest, it does not state that this is the only conduct that can be prohibited under the rules. In this sense Congress has not "directly spoken on the precise question at issue." Chevron, 467 U.S. at 842-43. Here the Secretary has made a policy decision to promulgate a rule that brings the federal program into compliance with international standards. See id. at 843-44. The Senate Report supports her efforts in this direction. Furthermore, the restriction of giving advice, while not mandated by Congress, harmonizes with the statutory conflict of interest provision and is certainly not "arbitrary, capricious, or manifestly contrary to the statute." Id. at 844.

With respect to the process, the Secretary points to the comments submitted by Harvey in the administrative record, and claims that his difficulty in obtaining a copy of ISO 65 aside, Harvey had an opportunity to participate in the rulemaking process with respect to this section. I agree that Harvey's inability to obtain a copy of the ISO rule, alone, does not render the process attackable under 5 U.S.C. § 706(2)(D), in that he was given notice of the proposed text of the rule and the opportunity to comment.

Harvey also argues that this limitation on giving advice infringes his right to free speech. This amounts to a claim that the rule is unlawful and must be set aside because it is contrary to his "constitutional right." 5 U.S.C. § 706(2)(B). "[D]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions." United States West, Inc. v. F.C.C., 182 F.3d 1224, 1231 (10th Cir. 1999) (collecting cases). The Secretary argues, in response, that the limitation on speech is minimal and that if Harvey wants the benefit of being an accredited certifying agent he must abide by this condition. He is free to forgo this role and thereby shed the limitation.

The parties have not provided this Court with much input with respect to the analysis of this constitutional claim. Harvey argues from the heart that he should be able to give advice and that the risk to program integrity is imaginary. The Secretary asserts that the limitation is constitutional because it serves a legitimate and necessary governmental interest of maintaining the certifiers's integrity and objectivity by prohibiting them from laboring under conflicts of interest. In support of this assertion, the Secretary cites to a portion of the Senate Report that does not address this concern, 1990 U.S.C.C.A.N. at 4948, and cites as authority Rust v. Sullivan, 500 U.S. 173 (1991). The latter involved speech restrictions on governmental grantees and it does not clearly control this facial challenge to restrictions on government approved certifiers performing inspection mandated by a federal act. It is not at all clear to me that the appropriate First Amendment framework would not involve cases such as United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995); Waters v. Churchill, 511 U.S. 661 (1994), Connick v. Myers, 461 U.S. 138 (1983), and Pickering v. Bd. of Educ., 391 U.S. 563

(1968). Although on an appropriate record I might be inclined to put a greater burden on the Secretary to explain how a prospective ban on advice-giving comports with the First Amendment, I do not believe that Harvey's skeletal argument that this conflict of interest speech limitation violates his First Amendment rights provides a sufficient basis for the Court to require placing such a burden on the Secretary at this juncture. If the matter were appropriately fleshed out in an "as applied" challenge, it might become appropriate to place a heavier burden on the Secretary, but given the record I have reviewed the regulation does not appear unreasonable on its face.

Count VII

In Count VII, Harvey seeks a finding that 7 C.F.R. § 205.236(a)(2)(i) violates 7 U.S.C. § 6509(e)(2),[7] which provides:

> A dairy animal from which milk or milk products will be sold or labeled as organically produced shall be raised and handled in accordance with this chapter for not less than the 12-month period immediately prior to the sale of such milk and milk products.

In apparent disregard of the statutory language, the rule makes a one-time exception for conversion of an entire dairy herd from conventional to organic production. The provision reads:

> (2) Dairy animals. Milk or milk products must be from animals that have been under continuous organic management beginning no later than 1 year prior to the production of the milk or milk products that are to be sold, labeled, or represented as organic: Except, That, when an entire, distinct herd is converted to organic production, the producer may:
>
> (i) For the first 9 months of the year, provide a minimum of 80-percent feed that is either organic or raised from land included in the organic system plan and managed in compliance with organic crop requirements; and
>
> (ii) Provide feed in compliance with § 205.237 for the final 3 months.

[7] Harvey also argues that the Rule violates subsection (c) of § 6509. However, as the Secretary points out, this provision of the statute is applicable to livestock raised for meat.

> (iii) Once an entire, distinct herd has been converted to organic production, all dairy animals shall be under organic management from the last third of gestation.

7 C.F.R. § 205.236(a).

Harvey objects to the Secretary's minimum of eighty-percent organic or quasi-organic feed because "organic feed" does not mean "a fraction of organic feed." Furthermore, he argues that because feed makes up roughly half of a cow's nutrition, the eighty-percent standard actually means that half of a cow's nourishment can be entirely nonorganic for three quarters of the year prior to milk sales. Harvey also objects to the procedure used to insert this exception into the final rule. He states that a similar provision was in the first proposed rule of December 1997 but was removed from the 2000 rules following intense public comment. Harvey quotes from the USDA website commenting on the decision to remove the exemption that acknowledges that there was "strong opposition to any nonorganic feed allowance by consumers" and that rejection of the scheme was appropriate due to inconsistencies with the NOSB recommendations. (Compl. at 14.) However, the "offending section" was placed in the final rule without any public comment in response to dairy industry lobbying. (Id. at 15.)

The Secretary states that "the Rule is avowedly an exception to the Act and the rest of the Rule in this respect." (Def.'s Reply & Cross Mot. at 35.) She offers no justification for the change but cites to a June 12, 2000, document, "Comments from National Organic Standards Board for the National Organic Program," which recommends, without explanation, that the rule be implemented in this manner with the exception for whole-herd conversion. (App. No. 16 at 5-6.) The Secretary also cites to a September 15, 2000, memorandum from an administrator in the USDA Agricultural

Marketing Service to the Office of Management and Budget providing responses to comments on the Organic Livestock Production Requirements. (App. No. 6.) Therein is this discussion of 7 C.F.R. § 205.266(a)(2):

> Comment: Commenters stated that requiring producers to provide existing dairy herd one year of organic feed prior to the production of organic milk created an insurmountable economic barrier for small and medium size operations seeking to convert. Commenters support the "new entry" of "whole heard conversion" provision offered by several existing certification programs.
> AMS Response: AMS concurs. AMS amended the origin of livestock requirements to reflect the whole herd conversion provisions recommended by the NOSB at its June 2000 meeting. The Final Rule requires that an entire, distinct dairy herd must be under organic management for one year prior to the production of milk. During the first nine months of that year, the producer must provide a feed ration containing a minimum of 80% organic feed or feed that is raised from land included in the organic system plan and managed in compliance with organic crop requirements. The balance of the feed ration may be nonorganically produced, but it must not include prohibited substances including antibiotics or hormones. The producer must provide the herd 100% organic feed for the final three months before the production of organic milk. The producer must comply with the provisions in the livestock health and living conditions practice standards during the entire year of conversion. After the dairy operation has been certified, animals brought on the operation must be organically raised from the last third of gestation, except that a producer may provide young stock with feed from land included in the organic system plan and managed in compliance with organic crop requirements up to twelve months prior to production of organic milk.

(Id. at 2.)

The Secretary argues that OFPA is at least ambiguous, perhaps silent, with respect to what the feed standards should be for organic dairy animals in the twelve-month period leading up to the sale of milk. Section 6509(c)(1) of title 7 provides that livestock should be fed "organically produced feed." Section 6502(14) defines "organically produced" as "produced and handled in accordance with [OFPA]." Rule 205.237(a) is a reasonable interpretation of the sections because it requires that organic livestock be fed "a total feed

ration composed of agricultural products ... that are organically produced and, if applicable, organically handled."

Furthermore, the Secretary points out that the exception created by 7 C.F.R. § 205.235(a)(2) arose out of notice and comment rulemaking. With respect to Harvey's complaints about process, the Secretary only states, "Plaintiff is incorrect. The USDA followed proper rulemaking procedure and addressed this particular issue during notice and comment rulemaking. The fact that Plaintiff did not get a second bite at the apple does not make section 205.236(a)(2)(i) procedurally invalid." (Def.'s Resp. & Cross Mot. at 36, record citation omitted.) The record support for this "aint so" response is a September 20, 2000, memorandum from an AMS administrator to the Office of Management and Budget providing responses to comments on the definitional section. (App. No. 4.) The cited page seems to have nothing to do with the Count VII contest and, without further explication by the Secretary, I am baffled by its significance, much less its probity to the question of whether there was or was not an irregularity in the inclusion of the exception in the final rules after the completion on the notice and comment period.

It appears as though the Secretary may have been 'cow-towing' to cow farmers. However, Harvey has not explained to me how the procedures for notice and comment rulemaking were impermissibly violated by the Secretary's change of heart on the whole-herd conversion standards. See 5 U.S.C. § 553 ("Rule Making"). In a recent case of national notoriety the District Court for the Western District of Oklahoma observed with respect to a similar challenge:

> The plaintiffs have also challenged the Final Amended Rule's regulation of preacquired account information on the grounds the FTC

> promulgated this regulation in violation of the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. §§ 553(b), (c). In particular, the plaintiffs have argued that certain entities and individuals, who believed, based upon the language of the proposed rule, that they would not be (but now are) subject to the Final Amended Rule, were deprived of their right to notice and an opportunity to comment on this provision of the Final Amended Rule.
>
> "The rulemaking process requires an agency 'to fairly apprise interested parties of all significant subjects and issues involved,' so that they can participate in the process. This policy is not undermined when an agency promulgates a final rule that does not mirror precisely the proposed rule outlined in the notice. A 'substantially different' rule is permissible as long as the participants had sufficient notice at the start of the process." Fertilizer Institute v. Browner, 163 F.3d 774, 779 (3d Cir.1998) (quoting American Iron & Steel Institute v. EPA, 568 F.2d 284, 291 (3d Cir.1977)) (other citations omitted).
>
> The Court has considered the allegedly "marked departures" between the proposed rule and the admittedly broader Final Amended Rule about which the plaintiffs have complained and in doing so, finds the relief requested by the plaintiffs is not warranted.
>
> As case law demonstrates, "notice requirements do not require that the final rule be an exact replication of the proposed rule." Association of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047, 1058 (D.C.Cir.2000). "[N]otice and comment requirements are met when an agency issues rules 'that do not exactly coincide with the proposed rule so long as the final rule is the "logical outgrowth" of the proposed rule.'" Id. at 1058-59 (quoting Fertilizer Institute v. EPA, 935 F.2d 1303, 1311 (D.C.Cir.1991)).

U. S. Sec., 2003 WL 22203719, *8, 2003 U.S. Dist. LEXIS 16650, *22-23.

Although there may have been some wavering on the part of the Secretary in this case, there is no indication that the proper procedures were not followed and all parties did have notice of the potential for the rule as finally promulgated, as the fact that there was a change (that better suited Harvey) suggested. And, it cannot be said even though there was some intermediate wavering, that neither the initial nor the final version was a "logical outgrowth" of the competing concerns facing the Secretary. See Chevron, 467 U.S. at 865-66 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to

make such policy choices-resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

I also note that the question of Harvey's standing on this count is premised mostly on his consumption of organic food in general (there is no allegation that he is a milk drinker) and his familiarity with dairy producers. That is, Harvey defends his standing on this count on the ground that the rule harms him as an organic consumer because it results in milk being labeled as organic under standards lower than would reasonably be anticipated based on the language of OFPA. (Pl.'s Reply at 28.) As a consequence, Harvey will not be able to tell whether the milk he purchases is truly organic and will not have the choice to purchase only truly organic milk. (Id.) In his affidavit in support of his standing, Harvey avers that as an organic inspector he has obtained familiarity with "organic field crops, herbs, fruits and dairy cows." (Harvey Aff. at 1, Docket No. 28.) It is not clear that he is certified to inspect dairy operations. He also states that he has "regular commercial dealings with organic dairy farmers, and [is] therefore familiar with the economic realities of that business, which is also fairly common knowledge in Maine." (Id. at 2.) These relationships are not sufficient to confer standing on Harvey. Lujan, 504 U.S. at 560 (holding that injury must be concrete and it "must affect the plaintiff in a personal and individual way").

Count VIII

With respect to state certification programs, OFPA provides:

> (a) In general
> The governing State official may prepare and submit a plan for the establishment of a State organic certification program to the Secretary for approval. A State organic certification program must meet the

> requirements of this chapter to be approved by the Secretary.
> (b) Additional requirements
> > (1) Authority
> > A State organic certification program established under subsection (a) of this section may contain more restrictive requirements governing the organic certification of farms and handling operations and the production and handling of agricultural products that are to be sold or labeled as organically produced under this chapter than are contained in the program established by the Secretary.
> > (2) Content
> > Any additional requirements established under paragraph (1) shall-
> > > **(A)** further the purposes of this chapter;
> > > **(B)** not be inconsistent with this chapter;
> > > **(C)** not be discriminatory towards agricultural commodities organically produced in other States in accordance with this chapter; and
> > > **(D)** not become effective until approved by the Secretary.

7 U.S.C. § 6507.

Count VIII of Harvey's complaint relates to the rule's limitation on private certifiers. The rule provides as relevant:

> A private or governmental entity accredited as a certifying agent under this subpart may establish a seal, logo, or other identifying mark to be used by production and handling operations certified by the certifying agent to indicate affiliation with the certifying agent: Provided, That, the certifying agent:
> ....
> > (2) Does not require compliance with any production or handling practices other than those provided for in the Act and the regulations in this part as a condition of use of its identifying mark: Provided, That, certifying agents certifying production or handling operations within a State with more restrictive requirements, approved by the Secretary, shall require compliance with such requirements as a condition of use of their identifying mark by such operations.

7 CFR § 205.501(b). The offending language, according to Harvey, is: "Does not require compliance with any production or handling practices other than those provided for in the

Act and the regulations in this part as a condition of use of its identifying mark." Harvey asks that the court delete this sentence.

The problem, in Harvey's view, is that this subsection prevents competition between private certifiers; harms consumers by not allowing standards which exceed the rule's; and prevents the future development of standards that would keep pace with emerging research and technology. This rule harms Harvey particularly as a certified organic blueberry grower. He explains that all of the twenty or so such growers have been certified by the Maine Organic Farmers and Gardeners Association (MOFGA). Up until 2002, MOFGA prohibited the use of hexazinone to control weeds in the field but this prohibition was removed so as to make MOFGA certification compatible with the USDA accreditation. This places Harvey in a disadvantage to growers who now use hexazinone. Furthermore, while the State could attempt to approve stricter standards than the Secretary, MOFGA cannot and, thus, Harvey's equal protection rights are violated as growers elsewhere (presumably in states with adopted certification programs) have an avenue to pursue recourse. He also complains that he is disadvantaged by the fact that MOFGA, vis-à-vis processing, must under OFPA certify products "made with organic" and these inferior products compete with Harvey's products labeled "organic."

More broadly, Harvey argues that rather than implement "consistent standards" the USDA has implemented standards that emphasize "uniformity." In addition, the "USDA has gone even further by imposing its standards as a maximum, and suppressing any private certifier who would put into the marketplace a stricter organic standard." (Compl. at 18.) He claims that the USDA exceeded its authority when it enacted maximum standards that pre-empt stricter state standards. (Id. at 20.)

The Secretary responds that the issue of higher production standards by private certifying agents was considered and rejected in the rulemaking process. The Federal Register recounts this:

> Numerous commenters stated that they wanted USDA to permit higher production standards by private certifying agents. A common argument for allowing higher standards was that practitioners must be allowed to "raise the bar" through superior ecological on-farm practices or pursuit of other social and ecological goals. Some commenters recommended that the language in section 205.501(b)(2) be replaced with provisions that would allow certifying agents to issue licensing agreements with contract specifications that clearly establish conditions for use of the certifying agent's identifying mark.
>
> We believe the positions advocated by the commenters are inconsistent with section 6501(2) of the Act, which provides that a stated purpose of the Act is to assure consumers that organically produced products meet a consistent national standard. We believe that, to accomplish the goal of establishing a consistent standard and to facilitate trade, it is vital that an accredited certifying agent accept the certification decisions made by another certifying agent accredited or accepted by USDA pursuant to section 205.500. All organic production and handling operations, unless exempted or excluded under section 205.101 or not regulated under the NOP (i.e., a producer of dog food), must be certified to these national standards and, when applicable, any State standards approved by the Secretary. All certified operations must be certified by a certifying agent accredited by the Administrator. No accredited certifying agent may establish or require compliance with its own organic standards. Accredited certifying agents may establish other standards outside of the NOP. They may not, however, refer to them as organic standards nor require that applicants for certification under the NOP or operations certified under the NOP comply with such standards as a requirement for certification under the NOP. Use of the certifying agent's identifying mark must be voluntary and available to all of its clients certified under the NOP. However, a certifying agent may withdraw a certified operation's authority to use its identifying mark during a compliance process. The certifying agent, however, accepts full liability for any such action.
>
> The national standards implemented by this final rule can be amended as needed to establish more restrictive national standards. Anyone may request that a provision of these regulations be amended by submitting a request to the NOP Program Manager or the Chairperson of the NOSB. Requests for amendments submitted to the NOP Program Manager will be forwarded to the NOSB for its consideration. The NOSB will consider the requested amendments and make its recommendations to

> the Administrator. When appropriate, the NOP will conduct rulemaking on the recommended amendment. Such rulemaking will include an opportunity for public comment.

65 FR 80548, 80607- 08. The Secretary also notes that both the OFPA and the rules allow States to enact more restrictive certification requirements and that the rule allows certifiers to certify additional standards but these cannot be referred to as organic standards and cannot be made a condition to receiving the USDA certification.

The Secretary's decision with respect to the promulgation of these regulations was consonant with her statutory powers and reasoned, given the concern for consistent standards that motivate the OFPA's enactment. Associated Fisheries Me., Inc., 127 F.3d at 109. Although Harvey protests that it would allow more innovation to allow variation, he points to nothing in the record that would lead this Court to conclude that the Secretary was arbitrary or capricious in her resolution of the concern. With respect to Harvey's equal protection claim, Harvey and the citizens of Maine have equal access to the legislative process and are equally able to press for the enactment of State certification programs that represent the will of Maine's population.

Count IX

Harvey's final count seeks a finding that the USDA neglected to implement important aspects of 7 U.S.C. § 6513(f)(4), which concerns the management of "wild" crops:

> An organic plan for the harvesting of wild crops shall--
>
> **(1)** designate the area from which the wild crop will be gathered or harvested;
> **(2)** include a 3 year history of the management of the area showing that no prohibited substances have been applied;
> **(3)** include a plan for the harvesting or gathering of the wild crops assuring that such harvesting or gathering will not be destructive to the

> environment and will sustain the growth and production of the wild crop; and
> **(4)** include provisions that no prohibited substances will be applied by the producer.

7 USCA § 6513(f). Harvey contends that subsection (f)(4) is an intentional effort on the part of Congress to prohibit the rotation of wild crops out of and then back into organic status.

The Secretary counters that 7 C.F.R. § 205.207 governs wild-crop harvesting practices:

> Wild-crop harvesting practice standard.
> (a) A wild crop that is intended to be sold, labeled, or represented as organic must be harvested from a designated area that has had no prohibited substance, as set forth in § 205.105, applied to it for a period of 3 years immediately preceding the harvest of the wild crop.
> (b) A wild crop must be harvested in a manner that ensures that such harvesting or gathering will not be destructive to the environment and will sustain the growth and production of the wild crop.

7 C.F.R. § 205.207. She contends that Harvey's is not a reasonable interpretation and that OFPA, when read in its entirety, with particular attention to the § 6504(2) three-year pre-harvest period, "contemplates a three year period for withdrawal of fields from organic production." (Def's Reply at 10.)

I could find no reference to wild crops in the Senate Report. The Register reflects the Secretary's rationale on wild crop regulation, in particular in the following three comments:

> One commenter stated that the definition for "wild crop" only referred to a plant or part of a plant that was harvested from "an area of land." This commenter was concerned that the definition would preclude the certification of operations that produce wild aquatic crops, such as seaweed, and stated that the OFPA does allow for certifying such operations. We agree with this commenter and changed the definition to refer to a plant or part of a plant harvested from a "site."

65 FR 80548, 80550.

> A wild crop that is to be sold, labeled, or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" must be harvested from a designated area that has had no prohibited substances applied to it for a period of 3 years immediately preceding the harvest of the wild crop. The wild crop must also be harvested in a manner that ensures such harvesting or gathering will not be destructive to the environment and will sustain the growth and production of the wild crop.

Id. at 80560.

> A number of commenters stated that the wild-crop harvesting practice standard was insufficiently descriptive and that the proposed rule failed to apply the same oversight to wild harvest operations as it did to those producing crops and livestock. Some commenters maintained that the proposed rule did not require a wild harvest producer to operate under an approved organic system plan. These commenters proposed specific items, including maps of the production area that should be required in a wild harvest operation's organic system plan. One commenter recommended that the definition for "wild crop" be modified to allow the harvest of plants from aquatic environments.
>
> We amended the practice standard for wild-crop harvesting to express the compliance requirements more clearly. Wild-crop producers must comply with the same organic system plan requirements and conditions, as applicable to their operation, as their counterparts who produce crops and livestock. Wild harvest operations are production systems, and they must satisfy the general requirement that all practices included in their organic system plan must maintain or improve the natural resources of the operation, including soil and water quality. We modified the practice standard to emphasize that wild harvest production is linked to a designated site and expect that a certifying agent would incorporate mapping and boundary conditions into the organic system plan requirements. Finally, we changed the definition of "wild crop" to specify that harvest takes place from a "site" instead of "from land," thereby allowing for aquatic plant certification.

Id. at 80566.

It seems that the Secretary reads OFPA to intend that wild crops be treated in the same manner as non-wild crops with respect to the allowance of rotation in and out of organic status. This is apparent not only in her decision to permit areas that have been

purposefully treated with prohibited substances to become classified as wild, but also in her expansive definition of "wild crop," which definition ("a plant or plant part harvested from a 'site'") would include even crops grown through traditional agricultural practices. However, the requirement enacted in 7 U.S.C. § 6513(f)(4) on its face goes beyond (or at least adds something to) the requirement of 7 U.S.C. § 6513(f)(2) and 7 U.S.C. § 6504(2) and the Secretary has either assumed it is a nullity or an unintended anomaly. Indeed, § 6513(f)(4), read in tandem with § 6513(f)(2), would appear to require not only that prohibited substances not have been applied to wild crops, but also that they not have been applied and not be applied to the area. That § 6513(f)(4) speaks to the area from which the crop is obtained is further reflected in the Congress's choice to impose the prohibition on "the producer" rather than simply the harvester. Without record (or logical) support for the Secretary's position I cannot conclude that she has acted in accordance with OFPA and the APA. Quinn v. City of Boston, 325 F.3d 18, 34 (1st Cir. 2003) ("[T]he judiciary is the final arbiter as to questions of statutory construction and must refuse to accept administrative interpretations that contradict clearly ascertainable legislative intent . . . ."). Accordingly, with respect to this claim I recommend that unless, in response to this Recommended Decision, the Secretary is able to satisfy the Court that she has satisfactorily carried out her rulemaking responsibilities with respect to this section, the Court issue an order pursuant to 5 U.S.C. § 706(1) remanding the matter to the Secretary to implement 7 U.S.C. § 6513(f)(4).

Conclusion

For the reasons stated herein, I **RECOMMEND** that the Court **GRANT** Mr. Harvey the relief he requests on Count IX by ordering the Secretary to promulgate a rule implementing 7 U.S.C. § 6513(f)(4), and otherwise **DENY** Mr. Harvey's motion for summary judgment in all respects. Conversely, I **RECOMMEND** that the Court **DENY** the Secretary's motion for summary judgment as to Count IX, but otherwise **GRANT** it in all respects.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection. Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

October 10, 2003

/s/ Margaret J. Kravchuk
Margaret J. Kravchuk
United States Magistrate Judge

HARVEY v. AGRICULTURE
Assigned to: JUDGE D. BROCK HORNBY
Referred to:
Demand: $
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 05:551 Administrative Procedure Act

Date Filed: 10/23/02
Jury Demand: None
Nature of Suit: 891 Agriculture Acts
Jurisdiction: U.S. Government Defendant

Plaintiff

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V.

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